89-836

Case No.

Supreme Court, U.S.
FILED
OCT 20 1989
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CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

RICHARD P. CRANE, JR., CHARLES R. ADKISSON, JEFF D. MCCOLL, JR., JACK STAFFORD, VINCENT M. HELM, JOE HAY, TRUSTEES OF THE SOUTHERN NEVADA CULINARY AND BARTENDERS PENSION TRUST,
Petitioners,

vs.

CONTINENTAL TELEPHONE COMPANY OF CALIFORNIA, dba CONTINENTAL TELEPHONE COMPANY OF NEVADA,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Nevada

PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can an administrative decision of the Public Service Commission of the State of Nevada be given res judicata effect where the administrative process provided no due process hearing?

PARTIES TO THE PROCEEDING

Petitioners:

RICHARD P. CRANE, JR., CHARLES R. ADKISSON, JEFF D. MCCOLL, JR., JACK STAFFORD, VINCENT M. HELM, JOE HAY, TRUSTEES OF THE SOUTHERN NEVADA CULINARY AND BARTENDERS PENSION TRUST

Respondent:

CONTINENTAL TELEPHONE COMPANY OF CALIFORNIA d/b/a CONTINENTAL TELEPHONE COMPANY OF NEVADA

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REFERENCE TO OFFICIAL REPORTS

The Nevada Supreme Court Opinion has not been printed in official reports at this time.

JURISDICTIONAL GROUNDS

1. Date of Nevada Supreme Court Opinion:
   June 30, 1989
2. Date of Order Denying Rehearing:
   August 22, 1989
3. Statutory Provision Conferring Jurisdiction:
   28 USC Sec. 1257(3)

APPLICABLE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

703.310. Complaint against utility, carrier or broker: Investigation by division of consumer relations; notice and hearing.

"1. When a complaint is made against any public utility, common or contract carrier or broker by any person, that any of the rates, tolls, charges or schedules, or any joint rate or rates are in any respect unreasonable or unjustly discriminatory, or that any regulation, measurement, practice or act directly relating to the transportation of persons or property, including the handling and storage of that property, or the service of any broker in connection therewith, or any regulation, measurement, practice or act affecting or relating to the production, transmission or delivery or furnishing of heat, light, gas, coal slurry, water or power, or any service in connection therewith or the transmission thereof is, in any respect, unreasonable, insufficient or unjustly discriminatory, or that any service is inadequate, the division of consumer relations shall investigate the complaint. After receiving the complaint, the division shall give a copy of it to the public utility, carrier or broker against whom the complaint is made. Within a reasonable time thereafter, the public utility, carrier or broker shall provide the division with its written response to the complaint according to the regulations of the commission.

"2. If the division of consumer relations is unable to resolve the complaint, the division shall transmit the complaint, the results of its investigation and its recommendation to the commission. If the commission determines that probable cause exists for the complaint, it shall order a hearing thereof, give notice of the hearing and conduct the hearing as it would any other hearing.

"3. No order affecting a rate, toll, charge, schedule, regulation, measurement, practice or act complained of may be entered without a formal hearing unless the hearing is dispensed with as provided in NRS 703.320."

703.373. Judicial review; Petition; answer, scope of review; grounds for setting aside decision of commission.

"1. Any party of record to a proceeding before the commission is entitled to judicial review of the final decision.

"2. Proceedings for review may be instituted by filing a petition in the district court in and for Carson City, in which the party resides, or in and for the county where the act on which the proceeding is based occurred. A petition must be filed within 90 days after the service of the final decision of the commission or, if a rehearing is held, within 30 days after the decision thereon. Copies of the petition must be served upon the commission and all other parties or record.

"3. The commission and other defendants shall file their answers to the petition within 30 days after the service thereof, whereupon the action is at issue and they must be ready for a hearing upon 20 days' notice to either party.

"4. The review must be conducted by the court without a jury and be confined to the record. In cases of alleged irregularities in procedure before the commission, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

"5. All actions brought under this section have precedence over any civil action of a different nature pending in the court.

"6. The court shall not substitute its judgment for that of the commission as to the weight of the evidence on questions of fact. The court may affirm the decision of the commission or set it aside in whole or in part if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(a) In violation of constitutional or statutory provisions;

(b) In excess of the statutory authority of the commission;

(c) Made upon unlawful procedure;

(d) Affected by other error of law;

(e) Clearly erroneous in view of the reliable; probative and substantial evidence on the whole record; or

(f) Arbitrary or capricious or characterized by abuse of discretion."

Case No.

In the Supreme Court

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OCTOBER TERM, 1989

RICHARD P. CRANE, JR., CHARLES R. ADKISSON, JEFF D. McCOLL, JR., JACK STAFFORD, VINCENT M. HELM, JOE HAY, TRUSTEES OF THE SOUTHERN NEVADA CULINARY AND BARTENDERS PENSION TRUST,
Petitioners,

vs.

CONTINENTAL TELEPHONE COMPANY OF CALIFORNIA, dba CONTINENTAL TELEPHONE COMPANY OF NEVADA,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Nevada

PETITION FOR CERTIORARI

STATEMENT OF THE CASE

1. Nature of the Case, Course of Proceedings, and Disposition Below:

This matter originated as a contract dispute between the parties arising out of two agreements which provided for the installation of underground telephone cables in two subdivisions owned by the Southern Nevada Culinary and Bartenders Pension Trust (hereinafter the "Pension Trust"). Because Continental Telephone Company of Nevada (hereinafter "Continental") was subject to regulation by the Public Service Commission (hereinafter the "PSC"), the Pension Trust filed a consumer complaint with the

PSC. After an informal investigation of the complaint by the PSC's staff and without any kind of due process hearing, the Public Service Commission dismissed the complaint. The Pension Trust did not seek judicial review of the PSC decision. Instead, the Pension Trust commenced an action in the Ninth Judicial District Court. Continental filed a motion for summary judgment upon the grounds that the civil action was barred by the Public Service Commission decision in the previous administrative proceeding. The Pension Trust opposed the Motion on the grounds that the PSC order could not bar the District Court action without having provided a due process hearing. The District Court accepted Continental's arguments and dismissed the complaint, because the Pension Trust had not sought judicial review. This decision was upheld by the Nevada Supreme Court in an opinion issued on June 30, 1989. Rehearing by the Nevada Supreme Court was denied on August 27, 1989.

2. Statement of Facts:

On March 19, 1979, the Pension Trust and Continental entered into two separate agreements providing for the installation of underground telephone cables in Units 6 and 7 of the Gardnerville Ranchos Subdivision which was then owned by the Pension Trust. Continental Telephone entered into the agreements under authority of the Nevada Public Service Commission General Order Number 9.

Thereafter, various disputes arose between the parties concerning application of the agreement. After attempting to resolve these issues directly with Continental, the Pension Trust filed a consumer complaint with the Public Service Commission by letter dated May 21, 1985. The letter from the Pension Trust contained certain correspondence which set forth the nature of the disagreement between the parties. The issues in dispute revolved around certain refunds to be provided to the Pension Trust and the manner in which certain ownership costs accrued and were calculated under the agreements.

The consumer complaint was referred to the Public Service Commission Consumer Relations Department for investigation. The investigation conducted by the Public Service staff consisted

primarily of an informal conference between the parties at which there was a general discussion of the issues. (Appendix, Pg. 12). No evidence was taken and no record of the conference was made. Based on the informal conference, the PSC staff set forth its position in a letter dated September 12, 1985. The staff determined there was no "probable cause" for the complaint. (Appendix, Pg. 12, 13).

The Pension Trust then requested consideration before the Public Service Commission. The Pension Trust was advised by letter from the Public Service Commission staff dated November 7, 1985, that the matter would be heard on the Public Service Commission agenda on November 11, 1985. (Appendix, Pg. 11). The matter was designated as item No. 21 of 30 items to be considered by the Public Service Commission on that day's agenda. (Appendix, Pg. 11).

The Pension Trust was specifically instructed that the matter set before the Commission was not for the purposes of taking testimony or presenting evidence and was designated as a meeting. (Appendix, Pg. 11).

The Public Service Commission was unable to consider the Pension Trust's Complaint at the November 11, 1985 meeting and reset the matter for November 25, 1985. At the meeting held on November 25, 1985, the Commission held a general discussion concerning the staff conclusions but took no evidence, testimony, or argument concerning the issues between the parties. No other meeting or hearing took place.

On December 17, 1985, the Public Service Commission issued its Order dismissing the Pension Trust's Complaint. (Appendix, Pg. 9). The Pension Trust did not seek judicial review.

The Pension Trust commenced an independent civil action against Continental in the Ninth Judicial District Court of the State of Nevada on June 25, 1986. The action was dismissed by the District Court as a result of Continental's Motion for Summary Judgment. (Appendix, Pg. 6). Continental argued that the Pension Plan Complaint was barred, because it had not sought a timely judicial review. The Pension Trust opposed the Motion arguing that the administrative process could not bar the Com-

plaint because it had not provided any type of due process hearing.

The Pension Trust appealed the Decision of the District Court to the Nevada Supreme Court. On June 30, 1989, the Nevada Supreme Court issued its opinion upholding the District Court. (Appendix, Pg. 2).

Rehearing was denied by the Nevada Supreme Court on August 22, 1989. (Appendix, Pg. 1).

ARGUMENT

The question presented by this Petition is not new. It has previously been decided by this Court, the Ninth Circuit Court of Appeals and many state courts. Unfortunately, the Nevada Supreme Court decided the question in a manner which conflicts with the resolution of this issue by these courts.

The question presented is whether an administrative decision of a state agency may be afforded res judicata effect where there has been no opportunity for a due process hearing. In effect, the Nevada Supreme Court decides that it can. This decision is in direct conflict with the decisions of this Court, the Ninth Circuit Court of Appeals and a number of sister state courts.

Although it was undisputed that the Pension Trust was never provided a due process hearing in this case, the Nevada Supreme Court declined to address the Pension Trust's due process contentions. Instead it concluded that the state District Court lacked jurisdiction in this matter, because the Pension Trust failed to seek judicial review of the Public Service Commission (PSC). The Pension Trust respectfully submits that the issue before the Court was not a question of jurisdiction, *but rather a question of the applicability of the doctrine of res judicata.*

The Complaint filed in this action was a civil Complaint for breach of contract between two private parties. It was *not* a petition for judicial review and it did *not* seek review of the PSC Order. The Complaint met all jurisdictional requirements for the filing of a civil complaint in District Court. Continental never

attacked either the Court's jurisdiction over the subject matter of the Complaint or the parties to the action.

On October 19, 1987, Continental filed its Motion for Summary Judgment in the state trial court seeking judgment on the grounds that the Pension Trust has failed to seek judicial review of the PSC order. Continental argued the Complaint was barred by the doctrine of res judicata, because the PSC Order had become final. It argued the Pension Trust's failure to seek judicial review resulted in the PSC Order becoming final and barring the subsequent Complaint by the Pension Trust. (See Continental's Motion for Summary Judgment, ROA, pages 20-26). *This was the issue before the Court.*

Rather than analyzing the issue presented, the trial court ruled that it lacked jurisdiction to entertain the Complaint, because the Pension Trust had not sought judicial review of the PSC Order. It dismissed the Pension Trust's Complaint for lack of jurisdiction.

The Nevada Supreme Court approached the case from the same perspective. It concluded the lower court lacked jurisdiction to hear the Complaint, because the time for seeking judicial review had expired, and the PSC Order had become final. In so doing, it resolved a contract dispute between the Pension Trust and a public utility on the basis of an administrative proceeding which provided no opportunity of any kind for a due process hearing. In resolving the dispute in this manner, both the trial court and the Nevada Supreme Court completely misconstrued the true issue presented for resolution. Jurisdiction of the trial court was never truly at issue.

There was never any question that the Court had jurisdiction over either subject matter or the parties before it. The issue was what effect the unreviewed PSC Order had on litigation of the dispute. The proper analysis to be applied quickly becomes apparent if one analogizes to the effect of a district court judgment which is never appealed. If two parties litigate a matter before the District Court and a judgment is entered, that judgment will become final in absence of an appeal. If a separate and independent complaint involving the same subject matter is subsequently filed before the District Court, the analysis to will be

applied is not one of jurisdiction but of the availability of the defense of res judicata. The Court would not be deprived of jurisdiction because the judgment was never appealed, it is simply that the doctrine of res judicata prevents a second litigation of the issues.

There should be absolutely no difference in the analysis of this case. Theoretically the Public Service Commission Order would become final when the time for seeking judicial review expired. When the Pension Trust subsequently filed its separate and independent action for breach of contract, the question was not of the Court's jurisdiction, but rather, the effect of the prior unreviewed PSC Order.

What the Court has overlooked here is that the issue turns on the question of whether the Public Service Commission Order is a final Order. That is the true issue in this case and that is the issue which has not been resolved.

THE PENSION TRUST RESPECTFULLY SUBMITS THAT THE NEVADA SUPREME COURT OVERLOOKED A CRITICAL FACTOR IN ITS ANALYSIS:

In order to have res judicata effect, an administrative proceeding must provide an adequate opportunity to adjudicate the issues.

This Court has addressed the application of res judicata based on an administrative proceeding. In *United States v. Utah Construction Co.*, 384 U.S. 394, 86 S. Ct. 1545, 16 L. Ed. 2d 642 (1966), the Court considered the issue of whether factual findings by the Board of Contract Appeals in a contract dispute between the U.S. Government and a contractor were binding in later proceedings before the Court of Claims. The Court determined that the findings were binding because the parties had a fair opportunity to litigate the issues. In so doing, the court stated the principle central to this appeal:

> "Occasionally courts have used language to the effect that res judicata principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it *which the*

> *parties have had an adequate opportunity to litigate,* the courts have not hesitated to apply res judicata to enforce repose." (Emphasis added).

See Also: *University of Tennessee v. Elliot,* 106 S. Ct. 3220, 92 L. Ed. 2d 635 (1986) and *Kremer v. Chemical Construction Corporation,* 456 U.S. 461, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982).

What constitutes an adequate opportunity to litigate has also been addressed by the U.S. Supreme Court. Perhaps one of the first cases to address the issue was *Londoner v. Denver,* 210 U.S. 373, 28 S. Ct. 708, 52 L. Ed. 1103 (1908). There the court held that an administrative proceeding providing only chance to submit written objections to a tax assessment on real property was insufficient:

> "A hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and if need be, by proof, however informal."

In *Interstate Commerce Commission v. Louisville & Nashville Railroad Co.*, 227 U.S. 88, 57 L. Ed. 431, 33 S. Ct. 185 (1913), the Court held that an administrative proceeding which provided no hearing or submission of evidence was improper. There the rates of a railroad were challenged before the Interstate Commerce Commission. The Court determined the railroad was entitled to a hearing and that an administrative order issued without a hearing was void:

> "Administrative orders, quasi-judicial in character, are void if hearing was denied, if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence'."
>
> ". . . a finding without evidence is beyond the power of the commission."

More recently, the U.S. Supreme Court has expressed that these principles were "immutable." In *Greene v. McElroy*, 360 U.S. 474, 3 L. Ed. 2d 1377, 79 S. Ct. 1400 (1959), Chief Justice Warren stated:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken not only in criminal cases, . . . but also in all types of cases wehre administrative and regulatory actions were under scrutiny."

What become apparent from these cases is that rudimentary concepts of due process are applicable to administrative proceedings. Without the presence of these due process protections, administrative proceedings can have no binding effect.

The Supreme Court further refined the due process requirements applicable to administrative proceedings in *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970). There, in the context of an administrative proceeding involving the termination of welfare benefits, the Court determined that the fundamental due process requirements are the opportunity to be heard, adequate notice, the right to confront and cross-examine adverse witnesses and a decision based solely on the legal rules and evidence adduced at hearing:

> "The fundamental requisite of due process of law is the opportunity to be heard . . ."
>
> "In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for

> a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally."
>
> "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."
>
> "Finally, the decision maker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing."

These due process requirements have now become embodied in the law of many states. At minimum these jurisdictions require that an administrative proceeeding provide a fair and adequate opportunity to litigate before it will be given binding effect. *Farmers Investment Co. v. Arizona State Land Department,* 136 Ariz. 369, 666 P 2d 469 (1983); *Industrial Commission v. Moffat County School District,* 732 P 2d 616 (Col. 1987); *Santos v. State Department of Transportation,* 64 Haw. 648, 646 P 2d 962; *Neunzig v. Seaman Unified School District,* 239 Kan. 654, 722 P 2d 569 (1986); *People v. Sims,* 32 Cal. 3rd 468, 651 P 2d 321 (1982); *Mountain View Electric Association v. P.U.C.,* 446 P 2d 424 (1986). California case law provides a particularly good analysis of the application of res judicata in light of these principles.

People v. Sims, 32 Cal. 3rd 468, 651 P 2d 321 (1982), involved a welfare recipient being prosecuted on fraud charges. The issues before the court was whether an administrative proceeding before the California Department of Social Services which exonerated Sims on the fraud charges would bar relitigation of the fraud charges in the criminal proceeding. In analyzing the issue the California Supreme Court turned to the guidance set forth in *United States v. Utah Construction Co.*, (supra) and adopted the standards set forth there: "Collateral estoppel may be applied to decisions made by administrative agencies when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had *an adequate opportunity to litigate* . . ." (Emphasis added). The court then analyzed these requirements and determined the

administrative proceeding would bar the criminal prosecution. In so doing, it specifically determined that the administrative proceeding provided an adequate opportunity to litigate relying on the fact that both parties had a fair opportunity to present evidence, confront and cross-examine witnesses and to present arguments on their case.

Three recent Ninth Circuit Court of Appeals cases have reviewed and analyzed *People v. Sims*, (supra), as the California case establishing the standards for evaluating the preclusive effect to be given administrative agency determinations. *Plaine v. McCabe*, 797 F 2d 713 (9th Cir., 1986); *Mack v. South Bay Beer Distributors, Inc.*, 798 F 2d 1279 (9th Cir., 1986); *Eilrich v. Remas*, 839 F 2d 630 (9th Cir., 1988). In each of the cases the Ninth Circuit applied the standards set forth in *Sims* (supra) and analyzed whether the administrative proceeding provided a fair opportunity to litigate. In two of the cases, *Plaine v. McCabe*, (supra) and *Eilrich v. Remas*, (supra) the Court determined the administrative proceedings provided a fair opportunity to litigate. Central to the determination in both cases was the court's reliance of the fact that the administrative proceeding provided the opportunity for presentation of evidence, examination, cross-examination, the right to subpoena witnesses and a decision based on the evidence presented at the hearing. *Plaine v. McCabe*, 797 F 2d 713 at p. 720; *Eilrich v. Remas*, 839 F 2d 630 at p. 634.

However, where the Ninth Circuit determined that the administrative proceedings did not provide for the presentation of evidence, it would not give preculsive effect to the administrative proceeding. *Mack v. South Bay Beer Distributors, Inc.*, (supra). In *Mack*, South Bay fired Mr. Mack. Mack was subsequently denied unemployment insurance benefits. The denial of benefits was subsequently affirmed by the California Unemployment Insurance Appeals Board finding that Mack had been terminated for misconduct. Instead of appealing the Appeals Board determination, Mack brought suit in Federal District Court alleging age discrimination. The Federal District Court dismissed the complaint on the grounds the Appeals Board decision precluded relitigation of the issues. The Ninth Circuit reversed the District Court on the grounds that Mack did not have an opportunity to

adequately litigate before the Appeals Board. Central to this determination was the fact that the record did not disclose the opportunity to present evidence on the issues.

It is therefore clear that in order for an administrative decision to have preclusive effect, certain rudimentary due process requirements must be established. The administrative proceeding must provide a fair opportunity to litigate, which opportunity must include a hearing, the right to present evidence, the right to confront and cross-examine adverse witnesses, and the right to a decision based solely on the evidence and law addressed at the hearing. In absence of these minimum requirements, the administrative process cannot serve as the basis for application of the doctrine of res judicata.

In all of these cases the Courts were faced with the issue of whether an *unreviewed* state administrative proceeding which had become final precludes relitigation of the issues before a District Court. In each instance, the focus of the analysis is on *whether or not the parties were provided an adequate opportunity to litigate the issues before the state administrative proceeding*. This is precisely the analysis that should have been performed by the Court in this case.

These cases can be contrasted to the cases relied on by this Court in its Opinion. In each of the cases cited by this Court in its Opinion, the issue is whether a Petition for Judicial Review can be filed after the statutory time limit. The cases do not deal with an independent action unrelated to the Petition for Judicial Review. More importantly, in each of the cases cited in this Court's opinion, there was a *full, contested*, adjudication in the state administrative proceeding. *That was not the case here*.

It is uncontroverted in this case that the Pension Trust has never had the opportunity to present evidence, cross examine witnesses or argue its position to a finder of fact. It has had no opportunity to adjudicate its claims. The Nevada Supreme Court has overlooked this critical factor in its analysis. The result denies the Pension Trust's right to due process and leads to a conclusion clearly in conflict with this and other courts.

The Pension Trust respectfully submits that in reaching such a result the Court has analyzed the issues in question in a manner contrary to other jurisdictions and contrary to the dictates of the U.S. Supreme Court which requires an administrative proceeding to provide an opportunity to adjudicate before it will preclude an independent litigation of the issues determined by the administrative entity. *United States v. Utah Construction Co.*, 384 U.S. 394, 186 S. Ct. 1545, 16 L. Ed. 2d 642 (1966). The Pension Trust respectfully submits that substantial justice has not been served by the decision in this case, and that the Pension Trust has suffered extreme prejudice.

Therefore, in the interest of justice and fairness, the Pension Trust requests that rehearing be granted.

Respectfully submitted this 20th day of November, 1989.

McDONALD, CARANO, WILSON, McCUNE,
BERGIN, FRANKOVICH & HICKS

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(Appendices Follow)

Appendix A

In the Supreme Court of the State of Nevada

No. 19083

Richard P. Crane, Jr., Charles R. Adkisson,
Jeff D. McColl, Jr., Jack Stafford, Vincent M. Helm,
Joe Jay, Trustees of the Southern Nevada Culinary and
Bartenders Pension Trust,
Appellants,

vs.

Continental Telephone Company of California,
dba Continental Telephone Company of Nevada,
Respondent.

Filed August 22, 1989

ORDER DENYING REHEARING

Reharing denied. NRAP 40(c).

It is so ORDERED.[1]

YOUNG
Young
STEFFAN
Steffan
SPRINGER
Springer
MOWBRAY
Mowbray

cc: Hon. Norman C. Robison, District Judge
McDonald, Carano, Wilson, McCune, Bergin,
Frankovich & Hicks
Allison, MacKenzie, Hartman, Soumbeniotis & Russell
Barbara Rice Reed, Clerk

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[1] The Honorable Robert E. Rose, Justice, did not participate in the decision of this appeal.

Appendix B

In the Supreme Court of the State of Nevada

No. 19083

Richard P. Crane, Jr., Charles R. Adkisson,
Jeff D. McColl, Jr., Jack Stafford, Vincent M. Helm,
Joe Jay, Trustees of the Southern Nevada Culinary and
Bartenders Pension Trust,
Appellants,

vs.

Continental Telephone Company of California,
dba Continental Telephone Company of Nevada,
Respondent.

Filed June 30, 1989

Appeal from an order of the district court dismissing appellants' complaint with prejudice. Ninth Judicial District Court, Douglas County; Norman C. Robinson, Judge.

Affirmed.

McDonald, Carano, Wilson,
Bergin, Frankovich & Hicks
and Timothy E. Rowe, Reno,
for Appellants.

Allison, MacKenzie, Hartman,
Soumbeniotis & Russell,
Carson City,
for Respondent.

OPINION

By the Court, MOWBRAY, J.:

This is an appeal from an order of the district court dismissing appellants' complaint with prejudice. Respondent Continental Telephone Company ("Continental") and the Southern Nevada Culinary and Bartenders Pension Trust's investment manager ("Pension Trust") entered into two contracts. Pursuant to these contracts, Continental agreed to install underground telephone

cables at a development in Gardnerville. Subsequently, disputes arose between the parties regarding costs and refunds under the contract. Pension Trust filed a written complaint with the Public Service Commission ("PSC") by letter dated May 21, 1985. The PSC's staff reviewed the complaint and found that Pension Trust's claims were meritless. Pension Trust appealed the decision to the PSC. The PSC heard the matter on November 25, 1985. On December 17, 1985, the PSC issued an order dismissing Pension Trust's complaint. The PSC concluded that no probable cause existed for the complaint because Continental had not violated the terms of the contracts. Rather than seeking judicial review of the PSC decision within ninety days pursuant to NRS 703.373,[1] Pension Trust filed a complaint in district court on June 25, 1986, more than six months after the PSC's order was filed. On October 19, 1987, Continental filed a motion for summary judgment. In an order filed April 4, 1988, the district court held that Pension Trust had failed to satisfy the procedural and time requirements of NRS 703.373, and dismissed Pension Trust's complaint with prejudice, concluding that Continental's motion for summary judgment was moot. This appeal followed.

Pension Trust contends that the district court erred by holding its complaint was barred by res judicata. This contention is meritless. The district court found it unnecessary to determine whether Pension Trust was barred by res judicata. The district court dismissed Pension Trust's complaint because Pension Trust failed to satisfy the procedural and time requirements of NRS 703.373.

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[1] NRS 703.373 provides, in relevant part:

1. Any party of record to a proceeding before the commission is entitled to judicial review of the final decision.

2. Proceedings for review may be instituted by filing a petition in the district court in and for Carson City, in and for the county in which the party resides, or in and for the county where the act on which the proceeding is based occurred. A petition must be filed within 90 days after the service of the final decision of the commission or, if a rehearing is held, within 30 days after the decision thereon. Copies of the petition must be served upon the commission and all other parties of record.

Pension Trust contends that the procedure used by the PSC denied it due process. Even assuming arguendo that the PSC denied Pension Trust due process, this contention lacks merit. Pension Trust filed a complaint in the district court, rather than a timely petition for judicial review. Courts have no inherent appellate jurisdiction over official acts of administrative agencies except where the legislature has made some statutory provision for judicial review. Lakeview Village, Inc. v. Bd. of Cty. Comm'rs, 659 P.2d 187 (Kan. 1983). NRS 703.373 specifies the procedure for seeking judicial review of a PSC order. It requires an aggrieved party to file a timely petition for judicial review. *See* NRS 703.373. When the legislature creates a specific procedure for review of administrative agency decisions, such procedure is controlling. Aleutian Homes v. Fischer, 418 P.2d 769 (Al. 1966). Instead of filing a petition for judicial review of the PSC's order, Pension Trust filed a new complaint. Therefore, the district court lacked jurisdiction and properly dismissed Pension Trust's complaint. Furthermore, Pension Trust's complaint was untimely because it was filed on June 25, 1986, long after ninety days from the service of the PSC's order. Pension Trust's failure to file a petition for judicial review within ninety days of service of the PSC's order deprived the district court of jurisdiction. *See* NRS 703.373; Mirin v. Checker Inc., 85 Nev. 569, 459 P.2d 774 (1969) (decision based on former similar statute); Enriquez v. Merit System Council, 589 P.2d 492 (Colo. 1979). "The time for taking an administrative appeal, as prescribed by statute, is jurisdictional and delay beyond the statutory time is fatal." Lakeview Village, Inc., 659 P.2d 187, 193. Therefore, the district court did not err when it dismissed Pension Trust's complaint for want of jurisdiction.

Appellants' other contentions lacking merit, we hereby affirm the judgment of the district court.[2]

MOWBRAY
Mowbray

We concur:

YOUNG
Young

STEFFEN
Steffen

SPRINGER
Springer

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[2] The Honorable Robert E. Rose, Justice, did not participate in the decision of this appeal.

Appendix C

In the Ninth Judicial District Court of the State of Nevada
In and for the County of Douglas

Richard P. Crane, Jr., Charles R. Adkisson,
Jeff D. McColl, Jr., Jack Stafford, Vincent M. Helm,
Joe Jay, Trustees of the Southern Nevada Culinary and
Bartenders Pension Trust,
Plaintiffs,

vs.

Continental Telephone Company of California,
dba Continental Telephone Company of Nevada,
Defendant.

ORDER

Defendant has filed a Motion for Summary Judgment pursuant to N.R.C.P. 56. Oral argument was conducted on the 4th day of April, 1988.

A preliminary review of the file indicates that the issues raised in the Complaint herein were in fact brought before the Public Service Commission by Complaint filed with the Commisson on May 22, 1985. The Complaint was dismissed by the Commission for lack of probable cause by Order entered December 17, 1985. See Exhibits A through C, attached to the Motion for Summary Judgment.

Plaintiff failed to file a Petition for Judicial Review within ninety (90) days of the Order of the Public Service Commission as required by N.R.S. 703.373. See infra. Instead, plaintiff filed an independent civil action with this Court on June 25, 1986.

N.R.S. 703.373 provides that the exclusive method of review for decisions of the Public Service Commission is by Petition for Judicial Review. N.R.S. 703.373(2) provides that a Petition for Judicial Review of a final decision of the Public Service Commission *must* be filed with ninety (90) days after service of the final decision of the Commission. The time requirements of N.R.S. 703.373(2) are mandatory. A District Court cannot consider a petition which is not timely filed. *Mirin v. Checker,*

Inc., 85 Nev. 569 (1969) (decision based on former similar statute).

Plaintiffs herein have filed to satisfy both the procedural requirements and the mandatory time requirements of N.R.S 703.373. The complaint herein must be, and hereby is DISMISSED with prejudice. N.R.S. 703.373; *Mirin v. Checker, Inc.*, 85 Nev. 569 (1969).

In light of the above, the pending Motion for Summary Judgment is moot.

DATED this 4th day of April, 1988.

NORMAN C. ROBISON
Norman C. Robison
District Judge

Copies served this 5th day of April, 1988, to: Timothy Rowe, Esq., 241 Ridge Street, Suite 400, Reno, NV 89501; Karen Peterson, Esq., P.O. Box 646, Carson City NV 89702.

CATHY COLQUHOUS

Appendix D

Before the Public Service Commission of Nevada

In Re Formal Complaint filed by Southern Nevada Culinary & Bartender's Pension Trust against Continental Telephone Company regarding refunds dispute.

Docket No. 85-1060

At a general session of the Public Service Commission of Nevada, held at its offices in Carson City, Nevada, November 25, 1985.

PRESENT: Chairman Scott M. Craigie
Commissioner Fred Schmidt
Commissioner Thomas E. Stephens
Commissioner Stephen Wiel
Commissioner Jo Ann Kelly
Secretary William H. Vance

ORDER DISMISSING COMPLAINT

The Public Service Commission of Nevada ("Commission") makes the following findings:

1. On May 22, 1985, Southern Nevada Culinary & Bartender's Pension Trust ("complainant") filed a complaint with the Commission against Continental Telephone Company ("respondent") wherein complainant alleges, among other things, that respondent was improperly computing ownership costs and refunds pursuant to a special G.O. 9 contract approved by the Commission for Gardnerville Ranchos' units no. 6 and no. 7, a project which was financed by the Southern Nevada Culinary & Bartender's Pension Trust.

2. On June 28, 1985, respondent answered the complaint by letter, stating that it was in a position to provide all telephone service requested for units 6 and 7 as of October 31, 1980, which is when it believed ownership costs began to accrue pursuant to the contract.

3. Follwing a discussion at a regularly scheduled agenda meeting on November 25, 1985, the Commission found that there

was no probable cause for the complaint in that there has been no violation on the part of respondent of the terms of the contract.

4. The complaint should be dismissed for lack of probable cause.

Therefore, based on the foregoing findings, it is hereby ORDERED that:

1. The complaint filed by Southern Nevada Culinary & Bartender's Pension Trust against Continental Telephone Company on May 22, 1985 is hereby DISMISSED.

2. The Commission retains jurisdiction for the purpose of correcting any errors which may have occurred in the drafting or issuance of this Order Dismissing Complaint.

By the Commission,

SCOTT M. CRAIGIE
Scott M. Craigie, Chairman

FRED SCHMIDT
Fred Schmidt, Commissioner

THOMAS E. STEPHENS
Thomas E. Stephens,
Commissioner

STEPHEN WIEL
Stephen Wiel, Commissioner

JO ANN KELLY
Jo Ann Kelly, Commissioner

Attest:

WILLIAM H. VANCE
William H. Vance, Secretary

Dated: Carson City, Nevada
12/17/85

(SEAL)

Appendix E

[SEAL]

State of Nevada
Public Service Commission of Nevada
505 East King Street
Carson City, Nevada 89710
(702) 885-4180

Richard H. Bryan
Governor

November 7, 1985

Timothy E. Rowe
Law Offices
241 Ridge St.
Suite 400
Reno, NV 89501

Re: Southern Nevada Culinary and
Bartender's Pension Trust vs.
Continental Telephone Co. of Nevada

File: CCU-061185-AM

Dear Mr. Rowe:

This is to acknowledge receipt of your letter of October 14, in which you requested that the above-referenced complaint be placed on the Commission's agenda.

In accordance with your request, the Commission will consider the matter at their regular meeting on Tuesday, November 11, which begins at 10:00 a.m. The complaint has been designated as Docket 85-1060, and is item number 21 of 30. A copy of the agenda is enclosed for our information.

Although this meeting is not designated for the taking of testimony, we suggest that you and/or other representatives familiar with the issues be present to answer any questions the Commission may have.

If you have questions or comments, contact this office.

Sincerely,

R.B. CLARK
R.B. Clark, Director
Division of Consumer Relations

Appendix F

[SEAL]

State of Nevada
Public Service Commission of Nevada
505 East King Street
Carson City, Nevada 89710
(702) 885-4180

Richard H. Bryan
Governor

October 1, 1985

Timothy E. Rowe
Law Offices
241 Ridge St.
Suite 400
Reno, NV 89501

Re: Southern Nevada Culinary and
Bartender's Pension Trust vs.
Continental Telephone Co. of Nevada

File: CCU-061185-AM

Dear Mr. Rowe:

This is in reference to the above-captioned complaint.

After the informal conference held on September 12, staff met to discuss the issues raised in your complaint and arrived at the following positions:

Issue No. 1: When do ownership costs begin to accrue to the Utility?

Staff's Position: Ownership costs accrue to the Utility 12 months after completion of construction. The applicable date can be determined upon the basis of an analysis of system capability, generally termed as "ready, willing and able to serve."

Issue No. 2:	How are ownership costs calculated?
Staff's Position:	Ownership costs are calculated as one half of one percent (1/2%) of the total advanced for construction costs and any refunds made or eligible to be made. The calculation for Gardnerville Ranchos #6 would be 1/2% of $539,427.89-$177,007.00.
Issue No. 3:	How are refunds paid?
Staff's Position:	Refunds are paid in cash and may be accumulated in $50.00 minimum payments or to a total refundable balance if less than $50.00. There is no contract provision allowing ownership costs to be offset against cash refunds.

Based on the foregoing, it is staff's opinion that there has been no violation of the terms of the contract approved by the Public Service Commission on March 19, 1979. We cannot support the hypotheses contained in your letter of April 2, to Mr. Soumbeniotis and find no probable cause for your client's complaint.

This decision was based on applicable rules and regulations and the facts and circumstances surrounding your complaint. As with any resolution rendered in compliance with NRS 703.310, you have the right to appeal this decision to the Commission if you feel we were unjust or unreasonable. To do so, please advise me in writing that you wish to have this matter considered by the Commission and I will place it on their agenda at the earliest possible date. You will be notified when arrangements are firm.

Sincerely,

R.B. CLARK
R.B. Clark, Director
Division of Consumer Relations

CERTIFICATION OF MAILING

I hereby certify that service of the foregoing was made this day pursuant to F.R.C.P. 5(b) by depositing a copy of the same in the U.S. Mails in Reno, Nevada, postage prepaid, addressed to:

Michael Soumbeniotis, Esq.
Allison, MacKenzie, Hartman,
Soumbeniotis & Russell, Ltd.
402 North Division Street
P.O. Box 646
Carson City, Nevada 89701

DATED: This 20th day of November, 1989.

JOHN J. MCCUNE